Filed 1/7/11 P. v. Stephens CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CEDRIC VAUGHN STEPHENS, Defendant and Appellant.	E048983 (Super.Ct.No. FSB801477) OPINION

APPEAL from the Superior Court of San Bernardino County. Duke D. Rouse, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Scott C. Taylor and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Cedric Vaughn Stephens asserts prejudice from an erroneous jury instruction. We affirm.

FACTS AND PRODEDURAL HISTORY

San Bernardino City Police Officer Landeros, an undercover narcotics officer, had been observing defendant's apartment intermittently for about two weeks in March and April 2008. During that time, he had seen a number of people knock on the door, engage in hand-to-hand contact with defendant, and leave. Officer Landeros, who for safety reasons stood some distance from the door, did not see what, if any, objects were passed between defendant and these individuals. On the afternoon of April 4, 2008, when a team of San Bernardino police officers entered defendant's apartment to execute a narcotics search warrant, they found defendant seated on a bedroom floor with two women, Darlene Sanchez and Rose Ross. With the aid of a "narcotics canine," officers found two tins containing rock cocaine and $250 in cash in one of the tins. Officers also found drugs in the women's purses: in Ross's purse they found a small amount of cocaine; in Sanchez's purse, they found a small amount of marijuana. In the kitchen, they found a package of baggies and an electric bill addressed to defendant. Police did not find any paraphernalia, smoking devices, "rolling papers," scales, or "pay/owe sheets" anywhere in the apartment.

In an amended information filed on June 6, 2008, defendant was charged with maintaining a place for selling or using controlled substances (Health & Saf. Code,

§ 11366, count 1), and with possession of cocaine for sale (Health & Saf. Code, § 11351.5, count 2).[1] The information also alleged that defendant had suffered a prior "strike" conviction. (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i).)

During a jury trial on May 18, 19, and 20, 2009, four of the eight police officers who had been part of the team that searched defendant's apartment testified to the facts as recited above. Officer Landeros also testified about a conversation he had alone with defendant in the breezeway outside the apartment at the time of the raid. After receiving *Miranda*[2] warnings, Officer Landeros said defendant told him there was cocaine in the apartment and that he had been selling it for about two weeks, but that he also smoked some of it.

Defendant testified too. He said he was 43 years old and had been using cocaine for more than 20 years. He lived at the apartment with his mother, who worked as a caretaker and was gone three or four days at a time. She had left for work the day before the search. Although the lease was in her name, defendant paid the utilities and telephone and gave her $300 a month toward the $600 rent. Ross and Sanchez knew defendant had a place for them to smoke cocaine when his mother was gone, and both women were present in his apartment at the time of the search. Ross had been to his place to smoke cocaine two times in the past, and he and she had smoked cocaine

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[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

together. The day his mother left for work, Ross had called him and said she was going back to Texas. That night, she had come to his place to "party for a couple of nights until she went back." Sanchez had come to defendant's place to smoke cocaine "[s]everal times" in the three months before April 4, 2008. On the day of the search, he and the two women had pooled their money, and defendant's friend "Ray" had driven him to Highland where he bought cocaine from a dealer named "Joe." The cocaine belonged to him, Ross, and Sanchez and they intended to smoke it all that day.

Defendant, Ross, and Sanchez each had their own cocaine pipes; defendant had two, one in each can of "dope." He had seen Ross and Sanchez use theirs before the police arrived. Police officers who testified they had not seen any paraphernalia in the apartment were lying. Officer Landeros, who testified he had seen people coming to defendant's apartment for short times and had observed some hand-to-hand movements on those occasions, was also lying. Neighbors occasionally came to defendant's apartment, but only to borrow cigarettes or to use his telephone. The money police officers found belonged to his mother and was between the mattress and the box springs of the bed. From the end of March until the time of the search in April, defendant had not sold crack cocaine at his apartment. Defendant had told Officer Landeros that he did not sell drugs. He had prior convictions for robbery, commercial burglary, and disorderly conduct.

The jury was instructed with, among others, CALCRIM No. 2440. Defendant did not object to the instruction. The jury was also instructed that facts, including the fact of

a defendant's intent, may be proven by either direct or circumstantial evidence, that it alone was the judge of the credibility of witnesses, and that it might choose to believe all, part, or none of a witness's testimony. The jury was also instructed regarding the offense of possession of a controlled substance as a lesser included offense of possession for sale.

During its two and a half days of deliberation, the jury asked once for clarification of the language of section 11366: "Does 'maintaining a place' mean a place separate from [defendant's] residence – a place solely for drug use?" To this, the court responded, "No." The jury's other questions related to the number of weeks and number of times of surveillance of defendant's apartment; the number of people seen coming to his door during the surveillance period; defendant's testimony regarding the location of his pipes; and testimony about the dog's search of the apartment.

On May 26, 2009, the jury found defendant guilty of count 1, but deadlocked nine to three on count 2. The court declared a mistrial as to count 2, and on June 11, 2009, the possession for sale charge was dismissed on motion of the prosecutor. Also on June 11, 2009, the court found the alleged prior true.

On August 5, 2009, the court sentenced defendant to two years for the section 11366 conviction, doubled because of his prior strike, for a total of four years in state prison.

DISCUSSION

Relying upon *People v. Franco* (2009) 180 Cal.App.4th 713 (*Franco*), defendant argues that CALCRIM No. 2440 represents a misstatement of the law and insists that it

prejudiced him by permitting the jury to base his conviction solely on his personal use of cocaine. The People agree that the instruction misstates the law, but argue that the error is harmless.

Standard of Review

"The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law." (*People v. Posey* (2004) 32 Cal.4th 193, 218.) In reviewing a trial court's admonitions to a jury, we are mindful that "instructions are not considered in isolation. Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury. [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 677.) It has long been the rule that "an appellate court, in determining whether error has been committed in the giving of jury instructions, must consider the instructions as a whole [citations]. We must also assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given [citation]." (*People v. Henley* (1969) 269 Cal.App.2d 263, 271.) "[A]n instructional error that improperly describes or omits an element of an offense, or that raises an improper presumption" is amenable to harmless error analysis. (*People v. Flood* (1998) 18 Cal.4th 470, 502-503.) The relevant question is whether, beyond a reasonable doubt, a rational jury would have found defendant guilty absent the error. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Cox* (2000) 23 Cal.4th 665, 676-677, citing *Neder v. United States* (1999) 527 U.S. 1, 18.)

Section 11366 and CALCRIM No. 2440

Section 11366 provides, in pertinent part: "Every person who opens *or* maintains any place for the purpose of unlawfully selling, giving away, *or* using any controlled substance [cocaine base] shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison." (§§ 11366, 11054, subd. (f)(1), italics added.) A violation of the statute requires continuous or repeated use of the place for the prohibited activity. (*People v. Horn* (1960) 187 Cal.App.2d 68, 72-74.) Section 11366 "can be violated without selling, merely by providing a place for drug abusers to gather and share their experience." (*People v. Green* (1988) 200 Cal.App.3d 538, 544.) Conviction under section 11366 requires evidence that the individual provided a place to others for use of the controlled substance; personal use alone will not suffice. (*Franco*, *supra*, 180 Cal.App.4th at pp. 718, 724-725.)

The trial court in *Franco* used a 2006 version of CALCRIM No. 2440 to instruct the jury, stating, in relevant part: "'The defendant is charged [with a] violation of Health and Safety Code section 11366. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant maintained a place; [¶] AND [¶] 2. The defendant maintained the place with the intent to sell or use a controlled substance, specifically cocaine, on a continuous or repeated basis at that place.'" (*Franco*, *supra*, 180 Cal.App.4th at pp. 718-719, fn. omitted.) During trial, the jury inquired whether the term "use" referred to private use or customer use. (*Id.* at p. 719.)

The *Franco* jury convicted the defendant of a violation of section 11366, but acquitted him of two charges of possession for sale, instead finding him guilty of the lesser included crime of simple possession. (*Franco*, *supra*, 180 Cal.App.4th at p. 719.) The appellate court concluded that the older version misstated the law by allowing a jury to convict the defendant based solely upon his personal use of cocaine.[3] (*Id.* at pp. 717, 721-723.) The court found it could not determine from the record whether the jury had convicted the defendant based upon the improper legal theory. Possible prejudice from the error was shown by the fact that the jury had acquitted him of possession for sales and convicted him of the lesser included crime of simple possession, as well as by its request for clarification, which demonstrated that "it was concerned about whether a conviction could be based upon defendant's personal drug use." (*Id.* at p. 725.)

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[3] In reaching this conclusion, the *Franco* court analyzed the language and legislative history of section 11366 in conjunction with *People v. Vera* (1999) 69 Cal.App.4th 1100, *People v. Ferrando* (2004) 115 Cal.App.4th 917, and *People v. Shoals* (1992) 8 Cal.App.4th 475. (*Franco, supra*, 180 Cal.App.4th at pp. 720-723.) The court found the language of section 11366 "ambiguous" and the legislative history of section 11366 "inconclusive." (*Franco*, at pp. 722-724.) When read in context, the court said it is not clear that the Legislature meant the word "using" to apply to persons using illegal drugs while "alone in the privacy of his or her own home." (*Id.* at pp. 721, 723.) *Franco* cited the *Vera* court's conclusion that, although section 11366 is a crime of moral turpitude for impeachment purposes, it is not meant to cover "'mere repeated solo use at home,'" the *Ferrando* court's finding that a person convicted of a violation of section 11366 is not eligible for treatment under Proposition 36, and the *Shoals* court's analysis tracing the origin of the statute to prohibition-era laws meant to prevent people from opening and maintaining a public nuisance such as a speakeasy. (*Franco*, at pp. 722-723, citing *People v. Vera*, at p. 1103, *Ferrando*, at p. 920 & *Shoals*, at p. 490.) Applying these cases and the rule of lenity, *Franco* held that "section 11366 does not apply to an individual's continuous or repeated use of controlled substances at home, absent evidence that the individual opened his or her home to others for the purpose of selling or giving away to them, or for the use by them of such substances." (*Franco*, at pp. 724-725.)

The version of CALCRIM No. 2440 used by the trial court in our case differs significantly from the instruction given in *Franco* by specifying the concept of use by others: "The defendant opened or maintained the place with the intent to sell, give away, use, *or allow others to use* a controlled substance or narcotic drug, specifically cocaine base, on a continuous or repeated basis at that place." (Italics added.) The actions and inquiries of our jury also differed significantly from those of the jury in *Franco.* Assuming, without deciding, that the version of CALCRIM No. 2440 with which the jury here was instructed misstated the law insofar as it included personal use as a possible basis for conviction, any error was harmless beyond a reasonable doubt.[4] (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Firstly, unlike in *Franco*, the jury in our case did not demonstrate any confusion regarding personal use as opposed to "customer" or guest use. (*Franco*, *supra*, 180 Cal.App.4th at p. 719.) Its only inquiry regarding count 1 concerned whether the place maintained had to be separate from the defendant's residence. All of its other inquiries related to count 2 and indicia of possession for sale (length and frequency of police surveillance of defendant's apartment, Officer Landeros's and defendant's testimony of their conversation at the time of his arrest, and number of people who came and went during the surveillance period), the charge of which it acquitted him.

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[4] The most recent revision of the instruction, the August 2009 version, clarifies further: "The defendant (opened/ [or] maintained) the place with the intent to (sell[,]/[or] give away[,]/[or] allow others to use) a (controlled substance/ [or] narcotic drug), specifically [cocaine base], on a continuous or repeated basis at that place." (CALCRIM No. 2440 (2009 rev.) (2006).)

Secondly, while we do not know for certain what other instructions had been given to the *Franco* jury, we do know that the jury in our case had been instructed that it alone was the judge of witness credibility. That it took its duty seriously is shown by the fact that, despite the testimony of Officer Landeros, it was unable to convict defendant of count 2, possession for sale. However, unlike the jury in *Franco*, our jury did not acquit defendant of the charge; it merely failed to reach a unanimous verdict. Nor did it convict him of the lesser included offense of simple possession. Had it done so, we might have suspected that it was basing its verdict on count 1 merely on personal use.

Thirdly, also unlike the situation in *Franco*, both direct and circumstantial evidence in our case—much of which was provided by defendant himself—demonstrated overwhelmingly that he repeatedly opened his residence as a place for others to smoke cocaine. That defendant "maintained" the apartment was indicated by the electric bill addressed to him there, and by his admission that he paid the telephone and other utilities and half of the rent. That he "opened" the apartment as a place for others to gather and share the experience of smoking cocaine was indicated by the fact that there were two other people—women with illicit drugs in their purses—with him in the bedroom where he and his stashes of cocaine were located at the time of his arrest.

Most importantly, defendant admitted under oath that both women had been to his apartment and had smoked cocaine with him there on more than one occasion; and he agreed that both knew that when his mother was gone he had a place for them to smoke cocaine. Ross, whom defendant said he had known for three years but who had only

been to his apartment for this purpose twice, had called him the day his mother left for work and had come to the apartment that night to "party" for a couple of nights. Sanchez had been there to smoke cocaine "[s]everal times" in the previous three months.

All these factors showed that defendant maintained, and regularly and repeatedly opened, his home as a place for other people to "gather and share their experience" of smoking cocaine. (*People v. Green*, *supra*, 200 Cal.App.3d at p. 544.) Beyond a reasonable doubt, no rational jury would have reached a different conclusion. (*People v. Cox*, *supra*, 23 Cal.4th at pp. 676-677.)

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P.J.

We concur:

RICHLI
J.

CODRINGTON
J.